UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO	)	
and	)	**Case 28-CA-060841**
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO	)	

BRIEF OF AMICUS CURIAE UNITED STATES POSTAL SERVICE

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INTRODUCTION

In its August 1, 2018, Notice and Invitation to File Briefs, the National Labor Relations Board ("the Board") invited parties and amici to provide input as to whether the Board should adhere to, modify, or overrule Purple Communications. In so doing the Board asked that the following questions be addressed:

1. Should the Board adhere to, modify, or overrule Purple Communications?

2. If you believe the Board should overrule Purple Communications, what standard should the Board adopt in its stead? Should the Board return to the holding of Register Guard or adopt some other standard?

3. If the Board were to return to the holding of Register Guard, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

The Board further stated that, "[i]n responding to these questions, the parties and *amici* are invited to submit empirical evidence, including anecdotes or descriptions of experiences that the Board may find useful in deciding whether to adhere to Purple Communications or adopt another standard."

The United States Postal Service, as *amicus curiae*, submits this brief addressing the preceding questions raised by the National Labor Relations Board in its Notice and Invitation to File Briefs in the above captioned matter regarding its previous decision in Purple Communications, Inc., 361 NLRB 1050 (2014).

ARGUMENT

1 & 2. Should the Board adhere to, modify, or overrule Purple Communications? What standard should the Board adopt?

The Postal Service maintains that the Board should overrule Purple Communications, and return to the standards governing equipment use set forth in Register Guard, 351 N.L.R.B. 1110 (2007).

This issue before the Board is a continuation of the long-standing tension between an employer's property rights and employees' Section 7 rights as evinced in the Supreme Court's decision *in Republic Aviation v. NLRB,* 324 U.S. 793 (1945). Indeed, the case at bar is a continuation of the lively discussions between the majority and the dissent in both Register Guard and Purple Communications as to the proper understanding and application of Republic Aviation with regard to employee use of emails for Section 7 activity.

The Postal Service believes that Purple Communications was wrongly decided and should be reversed. There are two problems with the Purple Communications decision. First, the Board's decision in Purple Communications misinterpreted the Supreme Court's decision in Republic Aviation v. NLRB, 324 U.S. 793 (1945) , which first attempted to strike the balance between an employer's property rights with employee's Section 7 rights. Second, the Purple Communications decision represented

a departure from past agency holdings and therefore ignored long-standing precedent. The Board should return to long standing precedent.

To better illustrate the Postal Service's positions in this regard, it will refer throughout this brief to United States Postal Service, 14-CA-195011, a charge just decided by Administrative Law Judge, Melissa Olivero on September 25, 2018. In that case, an employee, Roy Young, used the Postal Service 's email system by copying all employees in his work unit, both while he was on work time and while some of the recipients of the emails were also on work time. Mr. Young is a National Support Technician (NST) with the Postal Service's Maintenance Technical Support Center (MTSC), which provides technical assistance to all Postal Service facilities with mail processing equipment. The technical assistance is provided both via telephone and on site. The MTSC employs approximately 100 NSTs, domiciled in 76 to 78 facilities in six different time zone. Thus these NST's are remotely managed.

Mr. Young, and all the NST's, were instructed that emailing all employees in the network with non-work related items, during work hours, was an inefficient use of resources, cluttered their email boxes and distracted them from their assigned job duties. Despite repeated counseling and warnings, Mr. Young persisted in ignoring management instructions regarding non-work related emails. Consequently he was issued discipline.

Relying on *Purple Communications,* Judge Olivero ruled that the Postal Service violated the Act. The Postal Service is still within the period of time to file exceptions.

a. The Purple Communications Decision misinterpreted Republic Aviation

In Register Guard the majority pointed out that the analytical framework *of* Republic Aviation was inapplicable because Republic Aviation concerned face to face

solicitations and not the use of employer equipment (and not email or other forms of communication). Register Guard, 351 NLRB at 1115. What Republic Aviation does stand for is the proposition that employees may engage in in-person solicitation of others and may distribute materials in some employer-owned locations during non-working time, and that the Board may regulate traditional, face-to-face solicitation. *See* Republic Aviation, 324 U.S. at 803.

This area of the law is well settled. An employer may ban solicitation on working time and in working areas. See Restaurant Corp. of America v. NLRB, 827 F.2d 799, 806 (D.C. Cir. 1987) *(citing* NLRB v. Babcock & Wilcox Co*.,* 351 U.S. 105, 112-113 (1956*);* Republic Aviation*,* 324 U.S. at 797–798*).* Furthermore, an employer may limit distribution to nonworking areas of the employer's premises during nonworking periods. *See* Eastex, Inc. v. NLRB, 437 U.S. at 570–72 (*holding that and employers may not interfere with this right except to the extent necessary to maintain production or discipline*).

What Republic Aviation did not stand for is mandated access to and use of employer-owned equipment to engage in non-work related communications, simply because the employer has provided access to that equipment to its employees for business purposes. Register Guard, 351 NLRB at 1115.

Further, the Register Guard majority held that

> (The Act "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it.").

Register Guard, 351 NLRB at 1115, *quoting* NLRB v. Steelworkers (Nutone)*,* 357 U.S. 357, 363-364 (1958).

The Register Guard majority disagreed with the dissent's characterization of the issue that "only the Respondent's managerial interests — and not its property interests — are at stake". Register Guard, 351 NLRB at 1115. Rather, the majority held that the issue at stake was the employer's property interests.

> *Republic Aviation* requires the employer to yield its **property interests** to the extent necessary to ensure that employees will not be "entirely deprived," of their ability to engage in Section 7 communications in the workplace on their own time.

Register Guard, 351 N.L.R.B. at 1115, citing Republic Aviation, 324 U.S. at 801 fn. 6. [emphasis added]

The majority in Register Guard recognized that Republic Aviation gave employees no right to co-opt an employer's property or equipment. Register Guard, 351 N.L.R.B. at 1114 (noting that "the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory"; quoting Mid-Mountain Foods, 332 N.L.R.B. 229, 230 (2000)).

In a series of cases, the Board found that employers could not be coerced into surrendering their bulletin boards, public-address systems, copy machines, telephones, and, finally, their e-mail systems. See, respectively, Eaton Techs, 322 N.L.R.B. 848, 853 (1997); Heath Co., 196 N.L.R.B. 134 (1972); Champion Int'l Corp., 303 N.L.R.B. 102, 109 (1991); Churchill's Supermarkets, 285 N.L.R.B. 138, 155 (1987); and Register Guard, 351 N.L.R.B. at 1114. The Board explained that what Republic Aviation requires is balancing, not a complete sacrifice of property rights:

> What the employees seek here is use of the Respondent's communications equipment to engage in additional forms of communication beyond those that Republic Aviation found must be permitted. Yet, "Section 7 of the Act protects organizational rights

> . . . rather than particular means by which employees may seek to communicate."

Register Guard, 351 N.L.R.B. at 1115 (quoting Guardian Indus. Corp. v. NLRB, 29 F.3d 317, 318 (7th Cir. 1995)).

Even the dissent in Register Guard recognized the Supreme Court's admonition that "accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other." Register Guard, 351 NLRB at 1124 (*quoting* N.L.R.B. v. Babcock & Wilcox Company, 351 U.S. 105, 112 (1956)). However, the dissent only paid lip service to this holding because their position explicitly disregarded the employer's property rights.

When the Register Guard dissent became the majority in Purple Communications, the new majority invoked Republic Aviation to "adopt a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions." Purple Communications, 361 NLRB at 1054. However, in his dissent Member Miscimarra reiterated the argument that …

> the majority's creation of such an employee right impermissibly fails to accommodate the substantial employer property rights associated with its computer resources, which typically involve substantial acquisition and maintenance costs. The majority implies that, once an employer grants employees access to its email system for any purpose, the employer's property right in its email system becomes irrelevant. In my view, Republic Aviation--the very decision upon which the majority principally relies--demonstrates the incorrectness of such a position.

Purple Communications, 361 NLRB at 1068.

More specifically, the Purple Communications majority failed to consider the financial burdens additional e-mail traffic will place on an employer. Additional e-mail traffic is not, as the majority assumed, free. Even if one discounts the employer's initial capital investment in an e-mail system, increased volume imposes additional marginal costs. "Actiance, Osterman Study

Reveals True Cost of On-Premises Enterprise Vault Archive Solution," Markets Insider (Sept. 28, 2017), http://markets.businessinsider.com/news/stocks/Actiance-Osterman-Study-Reveals-True-Costs-of-On-Premise-Enterprise-Vault-Archive-Solution-723000 (noting that companies spend roughly $8,950 per terrabite of archived e-mails each year, with 35 gigabites added for each e-mail user). To begin, employers must pay for additional server space, must pay archival costs, and must pay for data retention. While one or two additional e-mails may add little to those costs, e-mail by its nature continues to accumulate, year after year. In the aggregate, additional costs are inevitable. Id. (noting the "common practice" among employers is to keep "everything forever—including data from departed employees").

The Postal Service is also analyzing the exorbitant costs associated with its current email archive / retention platform. Preliminary figures place this investment at over $50M. The increased traffic that *Purple Communications* allows would probably increase this number by a substantial amount.

The on-going costs of security associated with an employer's data systems (or internal communications network) are also substantial. For instance, the Postal Service's investment in the security of its information systems, including email, is $133M annually for personnel and $37.7M for tools. Additionally the Postal Service utilizes considerable personnel time in cybersecurity training. Over 200K employees take 3 mandatory 1-hour courses each year, which equates to over 600K hours of Cybersecurity training per year.

Direct monetary costs aside, increased e-mail traffic also poses a cost in employees' attention and time. Much like the pamphlets in Stoddard Quick, unwanted e-mail can clutter an employee's inbox and distract from business-related tasks. See, e.g., CAN-SPAM Act of 2003, 15 U.S.C. § 7701(a)(4)(recognizing that "the receipt of a large number of unwanted messages … decreases the convenience of electronic mail and creates a risk that wanted electronic messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of

electronic mail to the recipient"). In other words, e-mail solicitation creates digital litter. *Cf.* Stoddard Quick, 138 N.L.R.B. at 621 (observing that the distribution of literature placed a greater burden on the employer's property rights because of its potential to cause litter and undermine productivity).[1]

In the illustrative Postal Service case, cited above, the 100 NSTs are domiciled in 76 to 78 separate facilities, providing technical assistance to postal management 24 hours a day, 365 day a year. There are some NSTs on duty at all times. They do not take lunches or breaks at scheduled times, but do so at their discretion, depending on their particular job duties that day. As such, neither management nor the other NSTs know when an NST is working or is at lunch or on break. Moreover, the NSTs primary means of communication about work-related matters is via the employer's email system. Therefore, allowing NSTs to copy the entire MTSC network with any emails that are not work-related inherently clutters their email boxes and distracts them from their assigned job duties.

The majority in Purple Communications, however, downplayed this risk by adopting a "special circumstances" exception. That is, an employer can forbid nonbusiness e-mails if it proves that special circumstances make such a rule "necessary to maintain production or discipline." Id. at 1. The majority did not, however, explain what such a "special circumstance" might be, or how the employer might prove that it exists. Id. at 28 (Miscimarra, dissenting) (predicting that the majority's standard would sow confusion among employers and employees alike). The majority therefore left employers in the dark about when they can limit their e-mail systems to business use only – or indeed, whether they can ever do so. Id. In fact, in the

[1] E-mail traffic about Section 7 activity also poses administrative burdens. The majority's rule requires employers to open their e-mail systems for discussion of protected topics. Purple Communications, supra, 361 N.L.R.B. No. 126 at 1. Yet that requirement fits uneasily with other Board doctrines, such as the rule against unlawful surveillance. Id. at 20 (Miscimarra, dissenting) (citing Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974)). As the Purple Communications majority itself recognized, employers have a legitimate business need to monitor their employees' e-mails. Id. at 20. Employers must ensure that workers comply with business-related policies, protect sensitive information, and don't use employer resources for illegal or tortious activities. Id. See also Register Guard, 351 N.L.R.B. at 1114 ("The General Counsel concedes that the Respondent has a legitimate interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and disseminating confidential information, and avoiding company liability for employees' inappropriate e-mails."). But under the majority's rule, ordinary business e-mails will inevitably mix with messages about protected activity. An employer, therefore, monitors business e-mail at its own peril. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 20.

nearly three years since the Board decided Purple Communications, it has yet to find any qualifying "special circumstances." See, e.g., UMPC, 362 N.L.R.B. No. 191 (2015), slip op. at 4−5 (refusing to find special circumstances to justify a business-use e-mail policy, even in a hospital setting).

The majority also overstated the burdens that neutral e-mail rules place on employees' rights. Focusing on e-mail's centrality to the modern workplace, the majority concluded that employees *need* to use e-mail to effectively communicate with one another. Id. at 4-5. But that conclusion was remarkably anachronistic. Today, American workers have more ways to communicate than ever before. Id. at 23 (Miscimarra, dissenting)(noting the ubiquity of electronic forms of communication, like web-based mail and social media), 40−41 (Johnson, dissenting) (same). They have access to free web-based e-mail accounts, myriad forms of social media, and smart phones. Id. In fact, more than three-fourths of workers now own a smart phone, and nearly as many use social media. See, Aaron Smith, "Record Number of Americans Now Own Smartphones, Have Home Broadband," Pew Research Center (Jan. 12, 2017), http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/; "Social Media Fact Sheet," Pew Research Center (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/social-media/ (noting that seven in ten Americans now use social media to "connect with one another, engage with news content, share information[,] and entertain themselves"). In other words, they simply don't need their employers' e-mail systems to communicate.

They can – and already do – communicate through a variety of other tools. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 18 (noting that "employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in human history"). Indeed, in the illustrative case, one of the NSTs established a Facebook page in January 2017, which is accessible to all NSTs, but not management, so that they can discuss issues involving the contract and working conditions – the very type of communication the Act seeks to protect.

The Purple Communications majority, however, ignored these tools. It instead set out to solve a problem that did not exist. It assumed that workers in the digital age can only communicate through their employers' e-mail systems, and so adopted a "presumption" that they must have access to those systems. Id. at 1, 6-8 (discussing the centrality of business e-mail in the modern workplace). But as then-Member Miscimarra wrote in dissent, such presumptions have frequently proven unworkable:

> Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and when it is prohibited as a matter of law. Not only is such confusion almost certain to result from the majority's decision, it is unnecessary and unwarranted.

Id. at 28.

The Postal Service, therefore, avers that the Board's reasoning in Purple Communications is flawed and therefore it should be overturned. Register Guard better reflects the realities of the evolving workplace and recognizes an employer's property rights in its email systems. Register Guard strikes the proper balance between employees' Section 7 rights and employers' property rights and should be reinstated as the standard of analysis for these issues.

b. The Board Should Restore Long-Standing Precedent

Purple Communications also ignored decades of precedent and should be overturned. When overturning precedent, the Board is obligated to provide a "reasoned explanation." Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 208 (5th Cir. 2001) ("Although the NLRB can change its policies and must respond to new circumstances, 'a departure from past agency precedents requires at least a reasoned explanation of why this is done*.*" *quoting* Fiber Glass Systems, Inc*. v. NLRB*, 807 F.2d 461 (5th Cir. 1987)). As argued, supra, the Board misinterpreted Republic Aviation and therefore failed to provide an adequate explanation. "In my opinion, this rationale [*that*

employers lack any comparable property right in computer-based email systems] only makes sense from the perspective of someone who misunderstands the nature of property rights or is determined to disregard them." Purple Communications., 361 NLRB at 1072 (Miscimarra dissent).

Republic Aviation, which predates existence of email communication by several decades, does **not** establish a protected right to use employer equipment or systems for Section 7 purposes. To the contrary, the Board's long line of equipment cases -- which hold that, in the absence of discrimination, an employer may deny employees access[1] to business systems and equipment -- post-date Republic Aviation. *See* Register Guard, 351 N.L.R.B. at 1114 *and cases cited therein*[2] ("the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory.")

Nevertheless, despite the plain language of the Supreme Court's opinion and nearly 80 years of unbroken precedent, the Purple Communications majority discarded these limits. It instead held that Republic Aviation gave employees the right to convert an employer's e-mail system to their own purposes -- regardless of whether the employer's rules were discriminatory or whether the employees had other ways to communicate.

In his dissent, Member Miscimarra stated the obvious proposition that:

> The Act has *never* previously been interpreted to require employers, in the absence of discrimination, to give employees access to business systems and equipment for NLRA-protected activities that employees could freely conduct by other means.

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[2] *See, e.g.* Mid-Mountain Foods, 332 NLRB 229, 230 (2000) (television and video equipment), *enf'd.* 269 F.3d 1075 (D.C. Cir. 2001); Honeywell, Inc., 262 NLRB 1402, 1402 (1982) (bulletin board), *enf'd.* 722 F.2d 405 (8th Cir. 1983); Union Carbide Corp., 259 NLRB 974, 980 (1981) (telephone), *enf'd in rel. part* 714 F.2d 657 (6th Cir. 1983); Container Corp., 244 NLRB 318 fn. 2 (1979) (bulletin board), *enf'd.* 649 F.2d 1213 (6th Cir. 1981) (per curiam); Health Co., 196 NLRB 134 (1972) (public address system).

Purple Communications, 361 NLRB at 1071.

Member Johnson also noted in his dissent that

> [c]ontrary to my colleagues, the majority in Register Guard correctly held based on prior precedent that "[a]n employer has a 'basic property right' to 'regulate and restrict employee use of company property.'" 351 NLRB at 1114, citing Union Carbide Corp. v. NLRB, 714 F.2d at 663-664. My colleagues' assertion that the Board never endorsed this basic principle that an employer may prohibit all nonwork use of its equipment is simply wrong, as a matter of doctrinal history.

Purple Communications, 361 NLRB at 1083.

At the heart of this issue is a simple proposition that was upended by the Purple Communications decision. Under relevant court cases and long-standing Board precedent prior to Purple Communications, there was no Section 7 right to use an employer's property. Company emails and other company-provided electronic media used in the workplace are company property. Consequently they are indistinguishable from traditional forms of employee communication such as bulletin boards, intercoms, or telephones, which the Board and courts have held are the employer's property and therefore may be lawfully controlled by the employer. Therefore, an employer may restrict the nonbusiness use of its equipment. The Board should not interfere with the employer's right to control access to and use of its email systems, so long as such control is not discriminatory.

Indeed, the Board's equipment cases are consistent with the long-standing Board principle that employers are not required to give material support to unions or union organizers - and in fact, are prohibited from doing so. Purple Communications, 361 at 1075 (Miscimarra dissent). *See also* Electromation, Inc., 309 NLRB 990, 991, 998, n.31, 1017 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994) (holding that an employer violated the Act where it gave a group of employees supplies and materials to use during paid

time); 29 U.S.C. § 186(a)(3) (making it unlawful for an employer to furnish any "thing of value" to any "employee or group ... of employees ... in excess of their normal compensation," for the purpose of "causing such employee or group or committee directly or indirectly to influence any other employees" in the exercise of their Section 7 rights).

The United States Postal Service urges the Board to return to the existing standard under Register Guard and other long-standing precedent that an employer's property rights should trump Section 7 rights except under narrow circumstances. The majority in Register Guard and the dissent in Purple Communications provide the better analysis and framework for deciding these email issues.

3. If the Board were to return to the holding of Register Guard, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

Board case law already covers such circumstances. Register Guard provided that employers violate the Act if they deny access to email in a manner that discriminates against Section 7 activities, while permitting the use of email for other comparable nonbusiness purposes. Employees retained the protection afforded by decades of Board and court precedents to engage in solicitation during nonworking time and to engage in distribution during nonworking time in nonworking areas. Purple Communications, 361 NLRB at 1077 (Miscimarra dissent).

In his dissent in Purple Communications, Member Johnson proposed the following balancing test to answer whether the existing technological means of communication in the workplace are adequate for Section 7 activity:[3]

> (i) what is the primary function and use of the communications network at issue, (ii) are there alternative means (including alternative communication networks) that employees can use, and (iii) how remote is the risk of interference with the employer's operations if the network at issue is open freely to Section 7 communications?

Purple Communications, 361 NLRB at 1087.

Under the first prong, Member Johnson argued that "because a business email network is primarily used for work, then it is an operational area of the business" and not suitable for solicitation. Purple Communications, 361 NLRB at 1088.

As to the second prong, both Members Miscimarra and Johnson noted that there are available alternative electronic channels of communication beyond business email networks, including personal email, social media, and ordinary text messaging on personal communication devices. Consequently, these social media are much more powerful and effective for coordinated group activities than single-purpose business email systems. Purple Communications, 361 NLRB at 1072, 1088.

Member Johnson argued that once an employer's email system is opened to employee use, the risk of interference becomes immediate. Purple Communications, 361 NLRB at 1091. Member Miscimarra also raised the issue as to how employers could lawfully control and prohibit union solicitation during working time. Purple Communications, 361 NLRB at 1073.

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[3] Citing Justice Brennan's analysis in Beth Israel Hospital v. NLRB, 437 U.S. 483, 506-507 (1978) *(the Court upheld a Board decision invalidating an employer rule that restricted solicitation to employee locker rooms*). Purple Communications, 361 NLRB at 1070.

Register Guard better reflects the realities of the evolving workplace. Email is both a pervasive tool and a potential time-waster. Purple Communication ignores this reality. The Postal Service agrees with the Board's holding in Resister Guard that it is a "settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." 351 N.L.R.B. at 1116. Industrial experience and the weight of case law from the Board and the courts favor a return to the standard set forth in Register Guard.

4. **The policy at issue in this case applies to employees' use of the Respondent's "computer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?**

As emphasized in Register Guard and the dissents in Purple Communications, decades of Board case law have addressed the lawful limitations on employee uses of employer owned equipment. (See footnote 1, *supra*). Board case law on this point is clear. In Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), the Board declared:

> In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork-related matters, it may not "validly discriminate against notices of union meetings which employees also posted." (quoting In Re Fleming Companies, Inc., 336 NLRB 192, 194 (2001)).

The same standard can be applied going forward with regard to "computer resources." If an employer allows use of its computer resources to solicit other employees for personal purposes, such as the sale of cosmetic or other products

unrelated to the employer's business, but prohibits union solicitations on its computer resources, then the employer is unlawfully discriminating.

The "proper balance" to be struck goes back to the basic question about the employer's right to control working time versus employees' Section 7 rights. *Register Guard* gives employers a rational, nondiscriminatory means to govern electronic solicitation and maintain control of the workplace while respecting Section 7 rights. The Postal Service believes that *Register Guard* is effective guidance regardless of the media or technology involved in employee communications.

CONCLUSION

Given the growth in internet usage and social media, allowing greater rights to employees in this regard would necessarily be destructive of employer rights to protect their property investment in internet technologies. For all the foregoing reasons the Postal Service urges the Board to reconsider its decision in Purple Communications and return to the standards set forth in Register Guard that employees do not have a statutory right to use their employer's email system (or other electronic-communications systems) for Section 7 purposes.

DATED this 5th day of September, 2018.

Respectfully submitted,

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The undersigned hereby certifies that copies of the foregoing Brief of *Amicus Curiae* United States Postal Service were sent this 5th day of October, 2018, as follows:

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